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In the Supreme Court of the United States

OCTOBER TERM, 1980

MILTON J. SMITH,

TRUSTEE, APPELLANT,

v.

COMMISSIONER OF REVENUE,

APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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I

QUESTION PRESENTED

Whether Chapter 555 of the Acts of 1971 is violative of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the Constitution of the United States when it seeks to:

A. impose an income tax on the owners of income-producing real property and, at the same time, exclude from local property tax all other income-producing property, both tangible and intangible.

B. impose an additional property tax, in the form of an income tax, on income-producing real estate which is not proportional to the property tax on non-income-producing real property, as well as other property, tangible and intangible.

PARTIES

The parties are only those shown by the caption of this case.

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MILTON J. SMITH,
TRUSTEE, APPELLANT,

v.

COMMISSIONER OF REVENUE,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Milton J. Smith, Trustee of the Narist Trust, Appellant, appeals from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, dated March 9, 1981, holding that it is not unfairly discriminatory and a denial of equal protection of the laws under the State and Federal Constitution to impose an income tax on net rental income from real property which is also subject to local property tax, while exempting from local property taxation, at the same time, all other income-producing property, both tangible and intangible.

Opinions Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, which appears in the appendix hereto, p. 12, infra, is reported at Mass. Adv. Sh. (1981) 677.

The findings of fact and report of the Appellate Tax Board, dated August 5, 1980, are not reported. They are reported in the appendix hereto, p. 15, infra.

Jurisdiction

The decision of the Supreme Judicial Court for the Commonwealth of Massachusetts, holding that double taxation of the owners of income-producing real property only does not deny equal protection of laws as required by the Fourteenth Amendment of the United States Constitution, was entered on March 9, 1981. See p. 12, infra. A petition for rehearing was entertained and denied on March 30, 1981. See p. 21, infra.

This appeal is being docketed in this Court within ninety (90) days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

Constitutional Provisions

United States Constitution - Amendment XIV

> *Section 1* . . . "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Massachusetts

> *Part The First*, A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.

Article I. Equality and Natural Rights of All Men.

"All men are born free and equal, and have certain natural, essential and unalienable rights, among which may be reckoned the rights of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

Article X. Right of Protection and Duty of Contribution; Taxation; .....

"Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; and to give his personal service, or an equivalent, when necessary; ...."

Part The Second, Chapter 1, Section 1, Article 4

".... And further, full power and authority are hereby given and granted to said general court, from time to time .... to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth, ... and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same ...."

Forty-fourth Amendment

"Power of General Court to impose income tax. — Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner herinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not

derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises."

Statutory Provisions

Massachusetts General Laws. (Ter. Ed.)

Chapter 62 (as amended by Chapter 555, Acts of 1971):

"Section 1. (Definition) When used in this chapter the following words or terms shall, unless the context indicates otherwise, have the following meanings: —

(c) "Code", the Internal Revenue Code of the United States, as amended on January first, nineteen hundred and seventy-one.

(d) "Federal gross income", gross income as defined under the Code.

(j) "Corporate trust", any partnership, association or trust, the beneficial interest of which is represented by transferable shares.

Section 2. (Massachusetts gross income)

(a) Massachusetts gross income shall mean the federal gross income .... with the following modifications: — (none of which are relevant to this case)

Section 8. (Corporate Trust)

(a) A corporate trust engaged within the Commonwealth in any business, activity of transaction, whether or not it maintains an office or place of business

within the Commonwealth, shall be subject to the taxes imposed by this Chapter.

The Massachusetts adjusted gross income of such corporate trust shall be redetermined as if it were a natural resident person . . ."

Chapter 59

"*Section 2.* Property subject to taxation. — All property, real and personal, situated within the Commonwealth, and all personal property of the inhabitants of the Commonwealth wherever situated, unless expressly exempt, shall be subject to taxation; . . . .

Section 3. Real estate to include buildings, etc. Real estate for the purpose of taxation shall include all land within the Commonwealth and all buildings and other things erected thereon or affixed thereto . . . .

Section 4. Property taxable as personal estate. — Except as provided in the following section . . . . . personal estate for the purpose of taxation shall include:

First, Goods, chattels, money and effects, wherever they are; . . .

Section 5. (Certain Property Exempted)

The following property shall be exempt from taxation; . . .

"Twenty-seventh, Property, other than real estate, the income from which is taxed under Chapter sixty-two, or would be taxable thereunder if the property yielded income."

Prior to being amended by Chapter 555, Acts of 1971, Section 5, this section was as follows:

"Twenty-seventh, Property the income of which is taxed under Chapter sixty-two, or would be taxable thereunder if the property yielded income . . . ."

Raising The Federal Question

The only issue in this proceeding is, and always has been, the constitutional question. The Federal and Massachusetts Constitutions both have similar requirements of equal protection and due process.

The constitutional claim was raised in the appeal to the Appellate Tax Board in the appellant's brief, oral argument, requests for rulings of law and claim of appeal to the Supreme Judicial Court of Massachusetts.

The appellant continued to press this claim in its appeal to the Supreme Judicial Court of Massachusetts in its brief and oral argument as well as the petition for rehearing.

The Supreme Judicial Court of Massachusetts therefore considered and expressly rejected both this Federal, as well as Massachusetts, constitutional claim.

Statement of the Case

The appellant, Milton J. Smith, is trustee of a Massachusetts trust with transferable shares organized June 10, 1961 and owning rental real estate in Randolph, Massachusetts, from which the trust received rent in 1971 and 1972. Under Massachusetts law, such a "corporate trust" is taxed as an individual for income tax purposes.

On July 21, 1971 the legislature enacted Chapter 555 of the Acts of 1971 which materially changed the income tax law as of January 1, 1971 by repealing the first 8 sections of Mass. General Laws, Chapter 62 in favor of a new approach to the taxation of income. By defining gross income in terms of the Federal Internal Revenue Code, rental income became taxable for the first time because it is part of gross income for federal tax purposes.

It is an undisputed fact that from 1916 and prior to this 1971 amendment of Chapter 62 the income derived from real property inside the Commonwealth was not subject to income taxation under Chapter 62, as a result of the decision in *DeBlois* v. *Commissioner of Corporations and Taxation*, 276 Mass. 437 (1931).

As a result, on or about January 29, 1973, the trust filed its first Massachusetts income tax return and in accordance with G.L. c. 62, s. 62, was permitted to file returns on a fiscal year basis providing a return was filed for the short fiscal year in 1971. The return for the short year showed net rental income of $13,474.82 and a total tax of $673.74, to which the trust added interest of $40.42 and a penalty of $10, and paid $724.16 with the return. The commissioner assessed a penalty of $176.42 for late filing. The total bill of $900.58 was paid July 2, 1973.

Claiming to be aggrieved, the trust filed an application for abatement on April 11, 1975 and filed a timely appeal with the Appellate Tax Board on September 23, 1975 from the September 2, 1975 denial by appellee.

On or about August 16, 1973, the trust filed with the commissioner an income tax return on Form 3F for its fiscal year ending July 31, 1972 and showed net rental income of $25,088.29, a tax of $1,254.41, interest of $16.68, a penalty of $10, for a total of $1,281.09, which was paid with the return. On April 11, 1975 the trust filed an application for abatement which was denied by notice dated September 2, 1975 and the appellant filed a timely appeal with the Appellate Tax Board September 23, 1975.

Decision by the Appellate Tax Board for the appellee was promulgated August 20, 1979 and findings of fact and report thereon were promulgated August 5, 1980. The appellant filed a timely appeal on August 12, 1980 to the Supreme Judicial Court of Massachusetts and on March 9, 1981 the decision of the Appellate Tax Board was affirmed. On March 30, 1981 the

appellant's petition for rehearing was denied. The appellant timely filed the notice of appeal to this court on May 4, 1981.

The Question Is Substantial

The question of the excessive tax burden placed on the owners of real property has been one of national concern. It has led to "taxpayer revolts" in places such as California with "Proposition 13" and in Massachusetts, with "Proposition 2½".

On November 4, 1980, 59% of the voters of Massachusetts declared by referendum that local property taxation shall be limited to 2½% of fair market value.

It is therefore important that this Court firmly establish the equal protection principle that owners of income-producing real property cannot be required to carry more than their fair share of the tax burden than owners of other property, both tangible and intangible, income-producing or non-income-producing.

THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLES I AND X OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS PROTECT EVERY PERSON IN THE ENJOYMENT OF HIS PROPERTY.

Article X guarantees "equal protection of the laws", *Opinion of the Justices*, 357 Mass. 827 (1970).

Under the provisions of Article X that each individual contribute his share "to the expense of this protection", the words "his share" forbid the imposition upon one taxpayer of a burden relatively greater or relatively less than the burden which is imposed upon other taxpayers. *Opinion of the Justices*, 332 Mass. 769 (1955), restated in *Opinion of the Justices to Senate and House of Representatives*, 341 Mass. 738 (1960).

It was held in *Opinion of the Justices*, 270 Mass. 593 (1930) that the provisions of Article X are controlling of all constitutional provisions touching taxation.

Part the Second, Chapter 1, Section 1, Article 4 of the Massachusetts Constitution is the basic grant of power to tax. Here, again, is the constitutional requirement that taxes be proportional and reasonable.

"The Commonwealth's authority to impose an income tax derives from Article 44 of the Amendments to the Constitution of the Commonwealth — — The principal aim of adopting Article 44 in 1915 was to provide a more satisfactory system for the taxation of intangible personal property by permitting a tax on income from various types of property as a substitute for local taxes on the capital value of such property." *Ingraham* v. *State Tax Commission*, 368 Mass. 242 (1975).

"The very purpose of the Forty-fourth Amendment was to authorize the taxation of certain classes of property upon an income basis while other property was taxed at its capital value, and to dispense with the requirements of proportionality between taxes levied on income and those levied on capital value. Nevertheless, the requirement of proportionality is not repealed and taxes on income cannot be used either openly or covertly as a means of bringing about disproportionate taxation" citing *Duffy* v. *Treasurer and Receiver General*, 234 Mass. 42, 53 (1919), sustained sub nom. *Dane* v. *Jackson*, 256 U.S. 589 (1921). *Nichols, Taxation in Massachusetts* (3d ed.) (1938), 471.

"The tax imposed by Massachusetts General Laws, Chapter 62 is a property tax and not an excise. *Hart* v. *Tax Commission*, 240 Mass. 37, 39 (1921). A tax upon income derived from real estate is a tax upon real estate. *Pollock* v. *Farmers' Loan & Trust Co.* 157 U.S. 429, 481 (1895), *Opinion of the Justices*, 220 Mass. 613, 623, 624 (1915)." *DeBlois* v. *Commissioner of Corporations and Taxation*, 276 Mass. 437, 439 (1931). See also, *State Tax Commission* v. *Fine*, 356 Mass. 51 (1969).

Thus, rental real estate bears an extra property tax burden not borne by non-income producing real property as well as all other property, tangible and intangible.

Since Article 44 of the Amendments to the Constitution of the Commonwealth in 1915, it has been consistently reiterated that "rents of real estate are not taxable (G.L. (Ter. Ed.) C. 62 S. 1) obviously because such real estate is taxed directly, and a tax on the rents would in effect amount to double taxation," *United Shoe Machinery Corporation* v. *Gale Shoe Manufacturing Company*, 314 Mass. 142 (1943).

Thus, where the prior Massachusetts statutory balance was maintained by a property tax on tangible property and an income tax on intangible property, the scales were tipped to place the double burden on real property of both property and income tax.

Real estate within the Commonwealth (Massachusetts General Laws, Chapter 59, Sections 2 and 3) and also certain tangible property (Massachusetts General Laws, Chapter 59, Section 4) are subject to local taxation with certain exceptions (Massachusetts General Laws, Chapter 59, Section 5).

All property the income of which is taxable under the income tax law, or would be taxable thereunder if it yielded income, is exempt from local property tax — except for real estate (Massachusetts General Laws, Chapter 59, Section 5, Twenty-seventh, as amended by Chapter 555, Section 5, Acts of 1971).

This deliberate attempt to discriminate against rental real property and subject it to double taxation — while exempting tangible personal property and intangible property — is evidenced by the enactment of this special amendment which permits both a property tax and income tax only on rental real estate.

"Double taxation is incurred when the same property is twice subjected to the same tax by authority of the same state while other like property is taxed but once. If there is no

reasonable ground for the classification, such taxation is undoubtedly unconstitutional." *Opinion of the Justices*, 250 Mass. 591 (1924).

It is respectfully submitted that the double burden placed on rental real estate is arbitrary and unreasonable, as a matter of law, and violates the fundamental Federal and Massachusetts constitutional requirement that all property shall share equally and fairly in the burdens of government.

The "rational basis" asserted by the Supreme Judicial Court to deny the appellant constitutional protection was that "real estate as a class generally will be the beneficiary of local services in a far greater degree than other forms of income-producing property".

While this sua sponte unsupported conclusion is certainly disputable, it still does not address itself to the fact that rental real property has to bear a greater tax burden than non-income-producing real estate. For that, it is respectfully submitted, there is no rational basis.

Conclusion

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Appellant

June 26, 1981

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

S-2256

MILTON J. SMITH, Trustee[1]

v.

COMMISSIONER OF REVENUE

WILKINS, J. The appellant is the trustee of a Massachusetts trust with transferable shares, owning real estate in Randolph.[2] The trust appeals from a decision of the Appellate Tax Board (board) rejecting the trust's claim for an abatement of income taxes assessed on its net rental income.[3] The trust argues that the assessment of an income tax on its net rental income is unconstitutional because the Commonwealth may not impose both a local real estate tax on the value of the trust's real estate and an income tax on the trust's net rental income. The trust asserts that there is no authority under the Constitution of the Commonwealth to impose an income tax on rental income derived from Massachusetts real estate and that the tax classifications are unfairly discriminatory and deny equal protection of the laws. These assertions are without merit. We affirm the decision of the board.

1. We consider first the trust's claim that G.L. c. 62, § 2 (*a*), unconstitutionally seeks to impose an income tax on net rental income derived from Massachusetts real estate. There is no question that since the substantial rewriting of the tax law by St. 1971, c.555, the Legislature has intended that rental in-

[1] Trustee of the Narist Trust.

[2] We shall refer to the taxpayer-appellant as the trust.

[3] The income was earned between January 1, 1971, and July 31, 1972.

come derived from real estate be subject to the State income tax. See *Ingraham* v. *State Tax Comm'n*, 368 Mass. 242, 244-245, 247 (1975).

The Commonwealth's authority to impose an income tax is set forth in art. 44 of the amendments to the Constitution of the Commonwealth. *Ingraham* v. *State Tax Comm'n, supra* at 245. Article 44 "grants complete authority to tax the full range of incomes." *Id.* at 246. See *Tax Comm'r* v. *Putnam*, 227 Mass. 522, 525-526 (1917). The fact that, prior to the 1971 statutory revision, the sweep of the income tax laws was substantially narrower than permissible under art. 44 does not aid the trust's argument. Since that revision, G.L. c. 62, § 2 (*a*), has defined Massachusetts gross income as gross income for Federal income tax purposes with certain modifications not material here. See *Barnes* v. *State Tax Comm'n*, 363 Mass. 589, 591 (1973).

2. We find no merit to the trust's claim that it is unfairly discriminatory and a denial of equal protection of the laws under the State and Federal Constitutions to impose an income tax on net rental income from property which is also subject to a local property tax. The trust's argument in support of its claim of a constitutionally impermissible tax classification rests on the provision in G.L. c. 59, § 5, Twenty-seventh, as amended by St. 1971, c. 555, § 3, which exempts from local taxation all property "other than real estate," the income from which is or would be taxed under G.L. c. 62 (the income tax statute). The claim is that § 5, Twenty-seventh, unconstitutionally discriminates between real estate and other property.[4]

[4] We pass by the point raised by the Commissioner of Revenue that a challenge to an exemption provided in a statute concerned with local property taxation cannot properly be raised by a challenge to the denial of an abatement of State income taxes. The income tax statute does not distinguish between the taxability of rental income and the taxability of income from other property.

We see no indication that the trust argued before the board that the exemption from local taxation of income-producing property other than real estate violated the proportionality requirement of Part II, c. 1, § 1, art. 4, of

Any distinction in a tax statute that has a rational basis will survive a challenge under the equal protection clause. *Weinstock* v. *Hull*, 367 Mass. 66, 70, and cases cited, appeal dismissed for want of a substantial Federal question, 423 U.S. 805 (1975). The breadth of legislative discretion available to the Legislature is wide in tax classifications. See *Mary C. Wheeler School* v. *Assessors of Seekonk*, 368 Mass. 344, 346-347 (1975). There is a rational basis for the Legislature to subject real estate to local taxation (subject to exemptions for certain real estate), and not to subject other income-producir g property to local taxation. It can be found in the expectancy that real estate as a class generally will be the beneficiary of local services in a far greater degree than other forms of income producing property.

The decision of the Appellate Tax Board is affirmed.

So ordered.

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the Constitution of the Commonwealth. The trust's brief before us cites Part II, c. 1, § 1, art. 4, but does not present any argument worthy of attention in terms of that constitutional provision, nor does that brief consider, in presently relevant terms, the impact of art. 44 of the Amendments to the Constitution, which concerns the income tax. Article 44 states, in discretionary language, that a class of property whose income is taxed "may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the Constitution." We mention the possible argument of an unconstitutional lack of proportionality to make it clear that the issue was not before us in this case and not to suggest that the argument would be meritorious if it were before us.

THE COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

DOCKET Nos. 82009, 82010
NARIST TRUST
v.
STATE TAX COMMISSION

Promulgated Aug. 5, 1980

These are two appeals under the formal procedure pursuant to G.L. c. 62, s. 45 from a decision of the State Tax Commission refusing to abate income taxes assessed for the short fiscal year beginning January 1, 1971 and ending July 31, 1971 and for the fiscal year ending July 31, 1972.

These findings of fact are made pursuant to G.L. c. 58A, s. 13 at the request of the appellant.

William Gabovitch, Esq., for the appellant.
Peter Murphy, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

The appellant is a Massachusetts trust with transferable shares organized June 10, 1961 and owning real estate in Randolph, Massachusetts, from which the trust received rent in 1971 and 1972.

Docket No. 82009

On or about January 29, 1973, the trust filed its first Massachusetts income tax return and in accordance with G.L. c. 62, s. 62, was permitted to file returns on a fiscal year basis providing a return was filed for the short fiscal year in 1971. The return for the short year showed net income of $13,474.82 and a total tax of $673.74, to which the trust added interest of $40.42 and a penalty of $10, and paid $724.16 with the return. The commissioner assessed a penalty of $176.42 for late filing. The total bill of $900.54 was paid July 2, 1973.

Claiming to be aggrieved, the trust filed an application for abatement on April 11, 1975 and filed a timely appeal with this board on September 23, 1975 from the September 2, 1975 denial by the appellee.

Docket No. 82010

On or about August 16, 1973, the trust filed with the commissioner an income tax return on Form 3F for fiscal year ending July 31, 1972 and showed net rental income of $25,088.29, a tax of $1,254.41, interest of $16.68, a penalty of $10, for a total of $1,281.09, which was paid with the return. On April 11, 1975, the trust filed an application for abatement which was denied by notice dated September 2, 1975 and the appellee filed a timely appeal with the board September 23, 1975.

OPINION

The sole issue in this case, a question of law, is whether or not income derived from real property located in Massachusetts is subject to our income tax under c. 62 as amended by St. 1971, c. 555.

The appellant argues that: 1) income from real estate is exempt from the Massachusetts income tax; 2) the trust, not having consented to be taxed, was not subject to tax; 3) St. 1971, c. 555 in purporting to tax income from real estate is unconstitutional.

The Appellate Tax Board and the Supreme Court have analyzed and applied the provisions in c. 555 in several cases since its enactment, therefore, our discussion in this case is limited.

The 1971 amendment brought certain trusts within c. 62 for taxation for the first time. Chapter 62, s. 8(a), *D. L. Barnes, Jr., et al., Trustees* v. *State Tax Commission*, 363 Mass. 589 (1973).

The appellant argues, with a citation of cases, that our income tax is a property tax, and a tax on income is a tax on the property, which results in double taxation and is, therefore, unconstitutional. Formerly, c. 59, s. 5, cl. 27 exempted property from local taxation the income from which was taxed under c. 62, but cl. 27 was amended by s. 3 of c. 555 by inserting the words "other than real estate". Thus, real estate was specifically removed from the exemption, i.e., from local taxation and income from real estate to the trust made subject to tax under c. 62, s. 1(c),(d); s. 2(a); s. 8(a). Thus, by subjecting certain trusts to the income tax under c. 62 and not exempting real estate from the local tax under c. 59, cl. 27, the appellant claims the resultant double taxation is unwarranted double taxation under our state and federal constitutions.

St. 1971, c. 555, completely revised and revamped the Massachusetts income tax law. The Supreme Court, in *Timothy A. Ingraham* v. *State Tax Commission*, 368 Mass. 242, 244, (*Ingraham*) discusses the basic changes as follows:

"1. . . . . .

The changes in the tax law brought about by St. 1971, c. 555, seem to us far too extensive to permit analysis along the lines of the *Wheatland* [343 Mass. 650 (1962)] and *Fine* [356 Mass. 653 (1969)] cases. Prior to 1971 the only income to be taxed was that which could be characterized as within certain specified classes of income defined by the source of the income... This approach was completely altered by St. 1971, c. 555, s. 5. 'Gross income' for State purposes is now based on 'federal gross income' under the Internal Revenue Code, subject to certain modifications. G.L. c. 62, s. 2(a). Rather than being limited to specified classes of income, 'gross income' thus embraces 'all income from whatever source derived.' 26 U.S.C. s. 61(a) (1970). As was observed by this court in *Barnes* v. *State Tax Commission*, 363 Mass. 589, 592-593 (1973), 'there is no gainsaying...that the "1971 act completely rewrote the Income Tax Law, and in many respects com-

pletely revised the basic nature of the tax." ' It is undeniable that rental income derived from property irrespective of its location is contained within the Federal definition of gross income, 26 U.S.C. s. 61(a)(5) (1970). Also, it is evident from the legislative history of St. 1971, c. 555, that the Legislature was fully aware of the fact that rental income would be taxed under the proposed revision of c. 62, for such taxation had been specifically recommended by the Special Commission to Develop a Master Tax Plan and by the Governor in submitting the bills which were before the Legislature at the time...

2. . . . . .

The position of the taxpayer is that the income tax authorized by our Constitution is a property tax rather than a general income tax or an excise. Particular reliance is placed on the cases holding that 'a tax upon income derived from property is a tax upon the property' (cases cited)...

The Commonwealth's authority to impose an income tax derives from art. 44 of the Amendments to the Constitution of the Commonwealth. . . . The principal aim of adopting art. 44 in 1915 was to provide a more satisfactory system for the taxation of intangible personal property by permitting a tax on the income from various types of property as a substitute for local taxes on the capital value of such property... As described above, the income tax law up until 1971 was limited in application to specified classes of income, reflecting this historical purpose. However, by its terms, art. 44 contains no such limitations but rather grants complete authority to tax the full range of incomes. Less than two years after the adoption of art. 44, this court described the amendment in expansive language: 'The adoption and ratification of the Forty-fourth Amendment under...(the) circumstances renders imperative the inference that the word 'income' was there used with the purpose of setting at rest any doubt about the full and complete power of the Legislature to deal with 'income' as a

subject of taxation. That word was employed to express a comprehensive idea. It is not to be given a narrow or constricted meaning. It must be interpreted as including every item which by any reasonable understanding can fairly be regarded as income.'... The legislature has for the first time attempted to utilize the full measure of its power to tax incomes by adopting a general income tax, typically described as one taxing income irrespective of its source, in conformity with the Federal model. (cases cited) That rents and receipts from the sale of timber and gravel on land in Maine may 'fairly be regarded as income' in the constitutional sense can hardly be doubted.

...the nature and effect of this tax would be viewed as that of a tax on the income from property as distinguished from a tax on the property itself. Under the Supreme Court's analysis, the two types of taxes are 'distinct and separable' in that they are 'measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date.' *Id.* at 314. It is plain, then, that Federal law imposes no obstacle to construing the broad art. 44 power, which encompasses 'every item which...can fairly be regarded as income' (*Tax Commissioner* v. *Putnam*, 227 Mass. 522, 525-526 (1917)), to include income derived from real property in another State. We thus conclude that the tax imposed here by c. 62 is within the scope of the taxing power authorized by art. 44 of the Constitution of the Commonwealth."

To be sure, in the *Ingraham* case, the question was the taxability of income from foreign based real estate and the appellant here argues this point strenuously, attempting to distinguish *ingraham* on that basis. However, the board believes that the legislature did not make the radical and basic change it did in our income tax law solely for the purpose of reaching for taxation income from foreign based real estate.

The board is of the opinion that the statements of theory, principle and law made by the Supreme Court in *Ingraham*

far transcended the facts of that case and the careful analysis and reasoning used in their application in that and other cases will inevitably largely apply with similar cogency and validity to the facts in this case. Furthermore, what the court said with respect to the legislature's knowledge that it was taxing income from real estate regardless of its location and the legislature's intention to exercise its widest possible powers under the state and federal constitutions to tax income from real estate applies with equal force and logic to this case when real estate is located in Massachusetts.

On the basis of the evidence and arguments offered by the appellant in this appeal, the board is not ready to say that there was no statutory authority and the legislature had no constitutional power to tax this income and accordingly denied appellant's abatement.

Our decision for the appellee was promulgated August 20, 1979.

APPELLATE TAX BOARD

By (s) PETER J. ALLEY
Member

A True Copy,

Attest: (s) (Steven C. Douglas)
Asst. Clerk of the Board

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURTHOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8055

PATRICK J. HURLEY
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

March 30, 1981

William Gabovitch, Esq.
U.S. Trust Building
40 Court Street, Suite 1121
Boston, Massachusetts 02108

Re: Milton J. Smith, trustee
v. Commissioner of Revenue SJC-2256

Dear Mr. Gabovitch:

Please be advised that your Petition for Rehearing in re the above captioned case has been considered by the court and is denied.

Very truly yours,

(s) PATRICK J. HURLEY
Clerk

c.c.: MICHAEL BROAD, Asst. Atty. Gen.
Government Bureau, Rm. 2019
1 Ashburton Place, Boston 02108

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

SJC-2256

MILTON J. SMITH, TRUSTEE
APPELLANT

v.

COMMISSIONER OF REVENUE
APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Milton J. Smith, Trustee, the appellant above-named, hereby appeals to the Supreme Court of the United States from the decision of the Supreme Judicial Court of Massachusetts dated March 9, 1981 affirming the decision of the Appellate Tax Board, petition for rehearing being denied March 30, 1981.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

(s) WILLIAM GABOVITCH
WILLIAM GABOVITCH
Attorney for the Appellant

40 Court Street
Boston, MA 02108
(617) 227-9215

Dated: May 2, 1981

Office-Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2207

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MILTON J. SMITH, TRUSTEE,

Appellant,

v.

COMMISSIONER OF REVENUE,

Appellee.

On Appeal From The Supreme Judicial Court
For The Commonwealth of Massachusetts

MOTION TO DISMISS

FRANCIS X. BELLOTTI
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No. 80-2207

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MILTON J. SMITH, TRUSTEE,

Appellant,

v.

COMMISSIONER OF REVENUE,

Appellee.

On Appeal From The Supreme Judicial Court
For The Commonwealth of Massachusetts

MOTION TO DISMISS

QUESTION PRESENTED

Whether Massachusetts may impose a property tax on real property and an income tax on rents generated by that property.

STATEMENT OF THE CASE

The Commissioner of Revenue accepts appellant's statement of the case.

ARGUMENT

Under Massachusetts law, real estate is subject to local taxation under M.G.L. c. 59 and the rents and profits, if any, are included in the owner's gross income for state income tax purposes pursuant to M.G.L. c. 62. The 1971 revision of M.G.L. c. 62 at issue in this case "completely rewrote the Income Tax Law." Barnes v. State Tax Commission, 363 Mass. 589, 592-93 (1973). "[T]he Legislature was fully aware of the fact that rental income would be taxed under the proposed revision" of the statute. Ingraham v. State Tax Commission, 368 Mass. 242, 245 (1975).

There is no impermissible double taxation here. Ownership and use are distinct, and each may be taxed separately. See New York ex rel. Cohn v. Graves, 300 U.S. 308, 316 (1937); Lake Superior Mines v. Lord, 271 U.S. 577, 581-82 (1926).

Nor does the tax violate equal protection as claimed by the Trustee. The Trustee points to M.G.L. c. 59, §5, Seventeenth, which exempts from local taxation "Property, other than real estate, the income from which is taxed under Chapter sixty-two, or would be taxable thereunder if the property yielded income" (emphasis added).

Despite the general exception under G.L. c. 59, §5, Seventeenth, however, the Legislature has provided for direct tax on substantial amounts of property the income of which is also taxed under

M.G.L. c. 62. See, e.g., M.G.L. c. 59, §18, Second (personal property tax on unincorporated business); Mahoney v. Board of Assessors, 362 Mass. 210, 213 n.2 (1972) (citing principal exemptions to such taxation). Real estate does not stand alone.

Moreover, as the Supreme Judicial Court observed:

> There is a rational basis for the Legislature to subject real estate to local taxation (subject to exemptions for certain real estate), and not to subject other income-producing property to local taxation. It can be found in the expectancy that real estate as a class generally will be the beneficiary of local services in a far greater degree than other forms of income producing property.

Smith v. Commissioner of Revenue, Mass. Adv. Sh. (1981) 677, 678, ___ N.E.2d ___.

Any distinction in a tax statute that has a rational basis will survive an

equal protection challenge. Weinstock v. Town of Hull, 367 Mass. 66, app. dismissed for want of substantial federal question, 423 U.S. 805 (1975). Because there are "plausible reasons" for the distinction, no equal protection violation can be found. United States Railroad Retirement Board v. Fritz, 66 L. Ed. 2d 368, 378 (1980); see Minnesota v. Clover Leaf Creamery Co., 66 L.Ed. 2d 659 (1981).

CONCLUSION

Because no substantial federal question is presented, the appeal should be dismissed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Michael Broad

MICHAEL BROAD
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One Ashburton Place
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Date: July 24, 1981

CERTIFICATE OF SERVICE

I, Michael Broad, Assistant Attorney General, hereby swear that I have by July 24, 1981, served the within Motion to Dismiss by mailing three copies postage prepaid to: William Gabovitch, 40 Court Street, Boston, MA 02108.

Michael Broad

MICHAEL BROAD
Assistant Attorney General
Department of the Attorney General
One Ashburton Place
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Celia C. De Angelis
Notary Public
My Commission Expires: 11/14/86

Dated: July 24, 1981